

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE
November 24, 1999

IN RE:

APPLICATION OF BELL SOUTH, BSE, INC.
FOR A CERTIFICATE OF CONVENIENCE
AND NECESSITY TO PROVIDE INTRASTATE
TELECOMMUNICATIONS SERVICES

)
)
)
)
)
)
)

DOCKET NO.
98-00879

ORDER DENYING MOTIONS TO DISMISS

This matter came before the Tennessee Regulatory Authority ("Authority") on the above-docketed application of BellSouth, BSE, Inc. ("BSE") for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services ("Application") pursuant to Tenn. Code Ann. § 65-4-201. On March 23, 1999, at a regularly scheduled Authority Conference, the Directors of the Authority considered the pending motions to dismiss BSE's Application filed by AT&T Communications of the South Central States, Inc. ("AT&T") and the Southeastern Competitive Carriers Association ("SECCA").

BACKGROUND

BSE filed its Application on December 21, 1998, seeking to expand the limited certification previously granted to it by the Authority in Docket No. 97-07505.¹ In that proceeding, the Authority granted BSE limited certification to operate in territory open to

¹ BSE's application filed in Docket No. 97-07505 was denied in part at a regularly scheduled Authority Conference held on September 15, 1998. The Order reflecting this decision by the Authority was entered on December 8, 1998.

FILE

competition, excluding BellSouth Telecommunications, Inc.'s ("BellSouth") territory. In its December 8, 1998 Order, the Authority cited several concerns raised by the intervenors in Docket No. 97-07505 and concluded that the potential risk and harm of anti-competitive behavior outweighed the potential benefits to consumers of allowing BSE to operate as a competing local exchange carrier ("CLEC") in BellSouth's territory.

On January 22, 1999, BSE filed the testimony of its President, Mr. Robert C. Scheye, in support of its Application in this proceeding. Mr. Scheye testified as BSE's only witness during the hearing in Docket No. 97-07505. On January 29, 1999, the Authority issued a Notice establishing a schedule for the filing of petitions to intervene and the submission of discovery and responses. The Notice also set a Pre-Hearing Conference for February 9, 1999. At a regularly scheduled Authority Conference held on February 2, 1999, the Directors of the Authority appointed Chairman Melvin J. Malone to serve as the Pre-Hearing Officer in this matter.

On February 4, 1999, petitions to intervene were filed by AT&T, MCI Telecommunications, Inc. d/b/a MCI WorldCom ("MCI"), NEXTLINK, Tennessee, LLC ("NEXTLINK"), and SECCA. AT&T incorporated a motion to summarily dismiss BSE's Application within its petition to intervene. SECCA filed a separate Motion to Dismiss. At the Pre-Hearing Conference held on February 9, 1999, the Hearing Officer, without objection from BSE, granted the petitions for intervention. Also, at the Pre-Hearing Conference, BSE announced that, on February 8, 1999, it had filed in the Court of Appeals a Petition for Review of the Authority's December 8, 1998, Order entered in Docket No. 97-07505.² BSE

² The appeal that BSE brought before the Middle Section Court of Appeals was captioned in the following manner: *BellSouth BSE, Inc. v. Tennessee Regulatory Authority, Cause No. 01A01-9902-BC-00094*.

filed a response to SECCA's motion to dismiss on February 11, 1999 but did not file a response to AT&T's motion.

The Hearing Officer issued his *First Report and Recommendation of Hearing Officer* on February 18, 1999, in which he recommended that the Authority hold this matter in abeyance until such time as the Court of Appeals resolved the aforementioned appeal. BSE filed an objection to the Report on February 24, 1999.

At its March 2, 1999, Authority Conference, the Directors of the Authority, considered and approved by majority vote, the Hearing Officer's Report. Also at that Conference, BSE stated that it would seek a stay of its pending appeal of the Authority's December 8, 1998 Order. Thereafter, BSE filed a request for a stay in the Court of Appeals on March 5, 1999. On March 11, 1999, the Court of Appeals entered an order granting BSE's motion for a stay. Subsequently, on March 12, 1999, BSE filed in this proceeding copies of its March 5, 1999 motion and the Court's Order.

MOTIONS TO DISMISS

In its Motion to Dismiss, AT&T protested BSE's refiling of its Application less than two (2) weeks after the issuance of the Authority's Order in Docket No. 97-07505. AT&T asserted that BSE should not have refiled its Application until after BellSouth had fulfilled state and federal statutory obligations to open its local market to competition. Further, AT&T stated that the 47 U.S.C. § 272 safeguards, with which BSE proposes to abide, offer nothing more than that which BSE proposed in Docket No. 97-07505 and that these safeguards, which govern all Regional Bell Operating Company 271 affiliates, are insufficient to prevent BSE from engaging in potentially anti-competitive conduct. According to AT&T, the potential for anti-competitive behavior would be great even with

BSE's proposed safeguards prior to a determination under 47 U.S.C. § 271 that BellSouth has sufficiently opened its local market to competition. For these reasons, AT&T asked the Authority to summarily dismiss BSE's Application.

In its Motion to Dismiss SECCA stated that BSE's current Application offers nothing beyond its first application. According to SECCA, BSE's claims in its current Application that its certification will have a positive impact on competition and will provide additional customer benefits were issues discussed in Docket No. 97-07505. In addition, SECCA maintained that BSE's proposal to voluntarily abide by the structural separation requirements of 47 U.S.C. § 272 is the same proposal BSE made in the first proceeding in Docket No. 97-07505.

SECCA asserted that BSE's offer to abide by a price-floor is an empty gesture because any action by BSE to offer retail services for less than BellSouth's wholesale price would constitute an illegal "price squeeze" violating both state and federal anti-trust laws. SECCA concludes that BSE's filing is pre-mature due to the direction given by the Authority in footnote 10 of its December 8, 1998 Order.³ According to SECCA, footnote 10 suggests that BSE may refile its application after BellSouth is permitted to offer in-region interLATA service. SECCA asserted that the Authority can dismiss BSE's Application without a hearing in reliance upon the December 8th, 1999 Order.

³ Footnote 10 of the December 8, 1998 Order in Docket No. 97-07505 sets forth as follows:

From the authority's point of view, it is sufficient here for the Authority to find that the potential for harm from allowing BSE to provide service within BellSouth Telecommunications territory outweighs the benefits of a grant of full authority to BSE. However it should be noted that, even if BSE could be found to be a Section 272 affiliate today, the public interest concerns under state law, including T.C.A. § 65-5-208(c), would still have to be weighed. The Authority forms no conclusion as to whether such public interest concerns would be cured by BellSouth's compliance with the requirements of Section 271, or BSE's designation as a Section 272 affiliate. Should circumstances change, and if BSE files anew, then the Authority will consider those questions based upon the facts then before it.

BSE'S RESPONSE

In its response, BSE argued that SECCA's motion ignores the January 22, 1999 pre-filed direct testimony of Mr. Scheye wherein he discussed the fact that BSE had been granted certification in other states since the hearing in Docket No. 97-07505. Also, BSE stated that SECCA's motion ignores BSE's proposals to abide by a price floor and to voluntarily abide by the structural separation requirements of 47 U.S.C. § 272 and disregards BSE's experience in providing service offerings in Tampa, Florida since October, 1998. Finally, BSE claimed that SECCA's motion did not address Mr. Scheye's testimony and analysis concerning the effects of BSE's entry in the competitive telecommunications market.

BSE discussed that the Federal Communications Commission ("FCC") opened CC Docket 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability, in August 1998, subsequent to the hearing in Docket No. 97-07505. In that Docket the FCC is proposing an option to incumbent LECs to establish a separate affiliate to provide advanced services with reduced regulatory requirements. The FCC's proposal would require the affiliate to be governed by the provisions of 47 U.S.C. § 272. BSE argued that the Authority can apply these safeguards to BSE as a way to address the Authority's concerns regarding anti-competitive behavior in the event that BSE is granted statewide certification.

Finally, BSE asserted that the incumbent local exchange carrier ("ILEC"), GTE, or any of the six (6) wireless/cellular providers do not offer a comparable package to BSE's offering in Tampa. Thus, BSE asserts that it has endeavored to address the concerns raised by the Directors in Docket No. 97-07505 and as a result, the Authority should deny SECCA's Motion.

REQUIREMENTS FOR A HEARING UNDER TENN. CODE ANN. § 65-4-201

In their motions to dismiss AT&T and SECCA request the Authority to summarily dismiss the Application of BSE without providing to BSE any opportunity for an evidentiary hearing on its Application. Tenn. Code Ann. § 65-4-201 provides as follows:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, **after written application and hearing**, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system, or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate; provided, that this section shall not be construed to require any public utility to obtain a certificate for an extension in or about a municipality or territory where it shall theretofore have lawfully commenced operations, or for an extension into territory, whether within or without a municipality, contiguous to its route, plant, line, or system, and not theretofore receiving service of a like character from another public utility, or for substitute or additional facilities in or to territory already served by it. (Emphasis supplied.)

The foregoing language of Tenn. Code Ann. § 65-4-201(a) indicates that the certification process under that section contemplates some form of hearing on the Application. Although an evidentiary hearing was held regarding BSE's first application, the Authority concludes that the Docket No. 97-07505 hearing would not suffice under the statute where BSE asserts that new matters have been raised in its second Application for consideration by the Authority.

The Authority finds that BSE has brought forth new information in connection with its current Application. Based upon these findings the Directors unanimously voted to deny

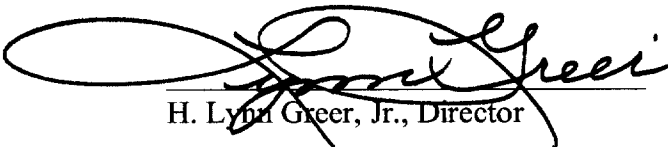
the Motions to Dismiss filed by AT&T and SECCA and determined that this matter should proceed to a hearing as provided in Tenn. Code Ann. § 65-4-201.

IT IS THEREFORE ORDERED THAT:

1. The Motion to Dismiss filed on February 4, 1999, by the Southeastern Competitive Carriers Association is denied.
2. The Motion to Dismiss filed on February 4, 1999, by AT&T Communications of the South Central States, Inc., as a part of its Petition to Intervene, is denied.



Melvin J. Malone, Chairman



H. Lynn Greer, Jr., Director



Sara Kyle, Director

ATTEST:



K. David Waddell, Executive Secretary